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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EDWIN I. ADUDDELL, PETITIONER

V.

GAF CORPORATION, ET AL, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Counsel of Record: MARK SIEGEL
3607 Fairmont Street
Dallas, Texas 75219
ATTORNEY FOR PETITIONER

31 pp

QUESTIONS PRESENTED

Rule 11 of the Federal Rules of Procedure provide that sanctions be imposed upon any party bringing suit in federal court when such suit is not "well grounded in fact." On the other hand, the discovery rule provides that a potential plaintiff is entitled to bring suit when he knows or should have known of his injuries. Thus, a potential plaintiff may be aware of circumstances evidencing an injury, but without it being well grounded in fact. So while the clock has started running on limitations pursuant to the discovery rule, the potential plaintiff is precluded from bringing suit under Rule 11 until he has accumulated enough evidence or information to make his action well grounded in fact.

The questions presented:

1. When may a potential plaintiff bring suit for injuries which he knew or should have known existed, but which were not yet well grounded in fact as required by Rule 11 of the Federal Rules of Civil Procedure; and when does the clock start for limitations in such an instance?

2. Can a plaintiff who waits until his cause of action is well grounded in fact before filing suit have the statute of limitations set back and started not from when the cause of action was well grounded in fact, but when plaintiff knew or should have known of his injuries.

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GAF CORPORATION, ET AL, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Edwin I. Aduddell, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 17, 1987, with rehearing denied on September 22, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the Appendix hereto as A-8.

The opinion and decision of the United States District Court for the Northern District of Texas - Dallas Division (Sanders, J.) has not been reported. It is reprinted in the Appendix hereto, A - 2.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 17, 1987. A timely petition for rehearing was denied on September 22, 1987, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by exisiting law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Edwin I. Aduddell, the petitioner herein, had worked with asbestos products for over 35 years before retiring. Aduddell

had become aware of cases of asbestosis in those who had worked with asbestos, and he was aware that because he had worked with asbestos that he ran a considerable risk of having asbestosis. In 1976, fearing that he might be suffering from the effects of asbestosis, Aduddell placed himself in the hospital to be tested for asbestosis. The results were negative. Aduddell was again screened for asbestosis, along with other former asbestos workers of considerable duration, in April of 1983. The screening, performed by Mt. Sinai Hospital of New York, lasted a full day. During this screening, Aduddell was shown an x-ray of his lungs. The x-ray revealed that Aduddell has some scarring of the lungs. At this point, the District Court ruled that Aduddell's cause of action accrued. A - 5. The District Court ruled that Aduddell knew, or should have known that he had asbestosis.[1] A-4.

Aduddell received the final results of the Mt. Sinai screening in October of 1983. The final results, while generally favorable, neither confirmed that Aduddell had asbestosis, nor did it state that he did not have the disease. Mt. Sinai did recommend that Aduddell continue periodic check-ups and seek legal counsel. Aduddell had another examination in October of 1983 and was diagnosed as having asbestosis in November of 1983. It is undisputed that Aduddell has believed, since at least 1976, that he had asbestosis. Aduddell consulted with his attorney in August of 1983.

Aduddell originally filed suit in the 134th Judicial District Court of Dallas County, Texas, on May 20, 1985. The defendants removed this action to the United States District Court

1. The only evidence presented to the District Court was Aduddell's depostion and his testimony at the bifurcation hearing. In his deposition, Aduddell stated that the doctors at the Mt. Sinai screening pointed out the scarring on his x-ray to him and told him that he had asbestosis. Aduddell later recanted that testimony and stated that he was told that he had scarring of the type generally associated with asbestosis. Either way, the District Court ruled that Aduddell knew, or should have known that he had asbestosis.

for the Northern District of Texas on June 24, 1985. Federal jurisdiction was based in diversity of citizenship.

On February 2, 1987, the District Court considered Aduddell's deposition of January 6, 1987, and Aduddell's testimony that day, and ruled that Aduddell knew or should have known that he had asbestosis as of April 24, 1983, the date of the Mt. Sinai screening. Accordingly, the District Court ruled Aduddell's case barred by limitations. A - 6.

On February 20, 1987, Aduddell perfected his appeal to the United States Court of Appeals for the Fifth District. On August 17, 1987, the Court of Appeals affirmed the ruling of the District Court. A - 8 - A - 22. Aduddell pointed out to the Court of Appeals that Rule 11 of the Federal Rules of Civil Procedure required a plaintiff's claim to be well grounded in fact. The issue as to what Aduddell knew or should have known in April 1983, being sufficient to meet the well grounded in fact requirement of Rule 11 was not addressed.

REASONS FOR GRANTING THE WRIT

1. A CONFLICT OF LAWS.

The Discovery Rule determines when a cause of action accrues, and when the appropriate limitations period starts to run. However, Rule 11 of the Federal Rules of Civil Procedure prohibits suit from being brought unless it is well grounded in fact. There are instances when the two rules conflict.

This case presented may only be the first in a line of similar cases involving application of the Discovery Rule and Rule 11 of the Federal Rules of Civil Procedure.

When applied, the Discovery Rule not only determines when a cause of action accrues, it also noted the time that limitations start to run for that cause of action. Thus, when a potential plaintiff knows or reasonably should know of his injuries, the time period in which he must file suit commences. Rule 11, however, does not permit suit to be filed unless it is well

grounded in fact. The problem presented is this: While a potential plaintiff may be deemed to know, or should have known, of his injuries as per the Discovery Rule, he may nonetheless be prohibited from filing that suit until such time as it has become well grounded in fact. In the interim, the limitations clock continues to run while the plaintiff is unable to file suit without subjecting himself to the sanctions provided by Rule 11. The potential consequences are: that a plaintiff will be denied part of his limitations period; a plaintiff will lose his cause of action because the limitations period has expired before his cause of action became well grounded in fact; or, as in the case at bar, a plaintiff who waits until his cause of action is well grounded in fact before filing suit has his accrual date, and thereby the limitations period, set back retroactively so that plaintiff's cause of action is lost.

The crux of the problem lies in the fact that there are now two standards for determining when a suit can be filed. Under the Discovery Rule, it would seem that a plaintiff could bring suit anytime after his cause of action has accrued. The limitations have already started to run in that instance. Rule 11, however, requires more, in that it requires that plaintiff's cause of action be well grounded in fact before suit may be filed. The "knew or should have known" standard is not the same as being "well grounded in fact."

If a plaintiff cannot file suit until his cause of action has accrued, and Rule 11 dictates that suit may not be filed until or unless it is well grounded in fact, it would seem to follow under Rule 11 that the cause of action accrues when the plaintiff's claim is well grounded in fact. To hold otherwise would be to separate the accrual date from the date limitations start to run.

2. THE NEED FOR GUIDANCE FROM THIS COURT.

It is well within the power of the United States Supreme Court to review and decide matters involving Rules of Federal Procedure. *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Accordingly, petitioner presents this issue involving Rule 11 of the Federal Rules of Civil Procedure and its application to the instant matter.

Because the relevant provisions of Rule 11 were implemented only recently, there is a lack of precedent on the point in question. Petitioner has been unable to find any federal court decision addressing the issue presented here. Although petitioner made this argument on appeal to the Fifth Circuit, the point was not addressed in that Court's opinion. Accordingly, there is no interpretive case law to answer, or to provide guidance in answering this issue.

Due to the lack of precedent cases on this issue, now is the most opportune time for this Court to set out its guidance in this matter. The issue presented here is not peculiar to the facts of this case alone. The conflicting aspects of the Discovery Rule and the "well grounded in fact" provision of Rule 11 are a potential problem in any personal injury suit. For this Court to sieze this opportunity and act on this matter would be to take advantage of the lack of precedent and provide guidance for the lower courts in their application of the law when this question inevitably rises again. For this Court to not act now will result in more appeals from lower courts with conflicting interpretations which will ultimately be presented to this Court again for resolution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

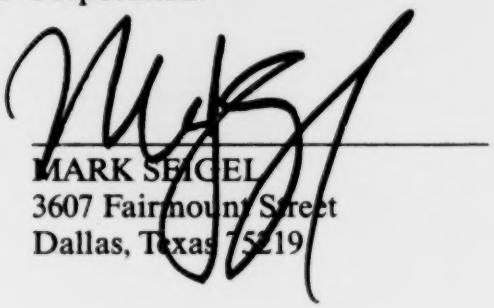
MARK SIEGEL
State Bar No. 18342100
3607 Fairmount Street
Dallas, Texas 75219

ATTORNEY FOR PETITIONER

December 21, 1987

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1987, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Gary D. Elliston, Plaza of the Americas, 2500 South Tower, LB 201, Dallas, Texas 75201-2880, attorney of record for GAF Corporation.



MARK SEIGEL
3607 Fairmount Street
Dallas, Texas 75219

CHRONOLOGY OF RELEVANT EVENTS IN FEDERAL COURT

1.) June 24, 1985	Case removed from District Court of Dallas County and placed in United States District Court for the Northern District of Texas, Dallas Division.
2.) February 13, 1986	Order signed by Judge Sanders outlining deadlines for trial scheduled for the week of January 5, 1987.
3.) November 5, 1986	Order revising trial docket signed by Judge Sanders setting new deadlines.
4.) February 2, 1987	Trial on its merits before Judge Sanders in the U. S. Northern District Court.
5.) February 6, 1987	Judgment entered pursuant to the Findings of Fact and Conclusions of Law by Judge Sanders and suit was dismissed on the merits.
6.) February 20, 1987	Filed Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit.
7.) April 30, 1987	Copy of Appellant's Brief was sent to U. S. Court of Appeals for the Fifth Circuit.
8.) May 29, 1987	Copy of Appellee's Brief sent to U. S. Court of Appeals for the Fifth Circuit.
9.) June 12, 1987	Copy of Reply Brief of Appellant sent to the U. S. Court of Appeals for the Fifth Circuit.
10.) August 17,1987	Fifth Circuit affirmed the judgment of the District Court.
11.) September 22, 1987	Fifth Circuit denied Motion for Rehearing.

time the court is in recess.

(recess at 10:35 a.m., to 11:15 a.m.)

THE COURT: The court is in session at this time in Civil Action No. CA3-85-1207, Aduddell Plaintiff vs. GAF Corporation and other Defendants, to announce its Findings of Fact and Conclusions of Law with regard to the limitation affirmative defense which has been pleaded by the Defendants and heard by the Court this morning. This case is before the Court at this time solely for determination of that issue in accordance with the Court's February 2nd, 1987 Order. I am reading from notes so I may go a little slower than counsel would like but please bear with me.

The Court has considered the pleadings, the evidence which was adduced here by way of testimony of Mr. Aduddell as well as the documentary evidence, the deposition evidence and makes the following Findings of Fact and Conclusions of Law and the Findings may be deemed Conclusions and the Conclusions may be deemed Findings.

The Finding of Fact are as Follows:

The Plaintiff Aduddell is a domiciliary of Texas and Defendants are corporations incorporated in states other than Texas, having principal places of business in states other than Texas and the case is before the Court diversity wise for jurisdiction.

From 1948 until 1974 the Plaintiff Mr. Aduddell was

employed as an insulator principally working directly with asbestos products manufactured by Defendants. His work in the industry continued beyond that period. He is now retired.

Before 1974 Mr. Aduddell became aware that exposure to asbestos products was dangerous or at least certainly there was a very heavy probability that it was dangerous. Indeed, he tried to advise other members of his Union and the citizenry at large of the hazards of asbestos exposure.

After 1974 the Plaintiff always wore protective clothing. That is, he was always fully protected against asbestos exposure when working around asbestos products.

In or around 1976 the Plaintiff Mr. Aduddell began to develop symptoms of fatigue. He entered Baylor Hospital in order to be examined for asbestosis. After an extended ten day examination he was told that he did not have asbestosis. However, as he testified he remained concerned and he thought that he might have asbestosis.

On April 24, 1983, the Plaintiff went to a screening for asbestosis arranged by the International Union held at the Wadley Blood Center by personnel of Mt. Sinai Hospital.

On that date the Court finds that the Plaintiff was informed that he had asbestosis of the lungs and that this information was imparted to him after he had under gone extensive and intensive tests.

The Court's Findings on this matter — I realize the

inconsistency between the Plaintiff's deposition testimony and his statement here in court — but it is pretty clear to me from the testimony that is uncontradicted that he did tell his family doctor in July, 1983 that he had or at least thought he had asbestosis and also he consulted with an attorney in August, 1983 well before the time he saw Dr. Kurt whom it is advanced told him thereafter that he had asbestosis and whom he has testified today was the first person who told him that. I do not find that to be believable.

So as of April 24, 1983 the Plaintiff knew or he should have known that he had asbestosis. He agrees that, even though he now says he was not told on April the 24th that he had it, he agrees that he was told on April 24th, 1983 that the lung scarring which was shown on an x-ray was associated with asbestosis and he also testified that he believed at that time that he had asbestosis and it seems to me this brings him under the premise that even if he did not know, and I find that he did know, but even if he did not know he should have known in the light of what he was told and what he agrees that he was told.

I further find that all of the products of the Defendants which contained asbestos to which the Plaintiff was exposed or which he came in contact with and which he alleges in his complaint either approximately caused or any one of which was a producing cause of his alleged injuries was sold and/or delivered by Defendants more than four years before May 20, 1985 and

and that is the date that Plaintiff filed his lawsuit.

The Court makes the following Conclusions of Law:

As I have stated the Court has jurisdiction under 28 U.S.C. 1332.

Secondly, Plaintiff's suit was for personal injury which is governed by Texas Civil Practice and Remedies, Section 16.003. That section provides

"that a suit for personal injury must be brought within two years of when it accrued; otherwise the action is barred." Plaintiff's suit accrued when he knew or in the exercise of reasonable diligence should have discovered that he had asbestosis and that date was April 24, 1983, more than two years prior to the filing of the suit.

For a more extensive discussion of that see *Fusco (Spelling) F-u-s-c-o* vs. *Johns-Manville*, 643 F2 1181 at 1183 and 1184, Fifth Circuit, 1981.

As a general rule states of limitation are regarded with favor. See *State* vs. *Williams-Dickie*, 399 SW 2nd, 568, 571. Fort Worth Court of Civil Appeals, 1966, an N.R.E. case.

The limitations defense should not be awarded by straining or overly precise interpretations which are designed to evade the statute of limitations and that has been the law in Texas since 1849. See *Weber* vs. *Cochrane*, 4 Texas 31. See also *California Chemical* vs. *Sasser*, 423 SW 2nd 347 at 350. The Corpus Christi Court in '67, no writ.

I further conclude that, if it has not already been expressed by me, that Plaintiff's suit was filed more than two years after he knew or should have know that he had asbestosis and therefore his suit is barred.

With respect to the warranty claim that Plaintiff makes the breach for express or implied warranty, those were filed beyond the limitation period and are banned by Section 2.725 of the Texas Business and Commercial Code.

So since the Plaintiff has failed to timely commence his action his suit is barred and judgment will be entered for the Defendants.

The law of limitations is a harsh loss sometimes but it is not up to the Court to rewrite it.

I will enter a judgment.

Thank you for putting the case on so concisely.

Court is in recess.

(Recess at 11:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDWIN I. ADUDDELL Plaintiff	*	
v.	*	Civil Action No. 3-85-1207-H
GAF CORPORATION, ET AL. Defendants	*	

JUDGMENT

This Judgment is entered pursuant to the Findings of Fact and Conclusions of Law announced by the Court in open court February, 6, 1987, at the conclusion of an evidentiary hearing.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Edwin I. Aduddell take nothing by his suit against Defendants GAF Corporation, et al., and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

Signed this 6th day of February, 1987.

BAREFOOT SANDERS
ACTING CHIEF JUDGE
Northern District of Texas

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1136
Summary Calendar

EDWIN A. ADUDDELL,

Plaintiff-Appellant,

v.

GAF CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA-3-85-1207)

(August 17, 1987)

Before RANDALL, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:*

Edwin I. Aduddell appeals the district court's grant of summary judgment in favor of GAF corporation and other defendants

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has detemined that this opinion should not be published.

on their statute of limitations defenses. Because we agree with the district court that Aduddell either knew or should have known that he had asbestosis more than two years prior to the institution of this lawsuit, we affirm. We also agree with the district court's conclusion that the four-year statute of limitations had run on Aduddell's claims sounding in breach of warranty, and we decline to address the issue of the constitutionality of this statute of limitations under the "open courts" provision of the Texas Constitution in light of Aduddell's failure to make this argument to the district court. Finally, we find no abuse of discretion in the district court's exclusion of one of Aduddell's expert witnesses on the ground that Aduddell failed to comply with local rules concerning notification of intent to use the testimony of expert witness.

I.

Aduddell worked from February 1948 until June 1986 as an asbestos insulator. It is undisputed that Aduddell had no contact with asbestos products after 1974. Sometime in 1974, Aduddell learned of the health hazards associated with working with asbestos. Fearing he might be suffering from asbestosis, Aduddell checked into Baylor Hospital in 1976 for 10 days of examinations. He was told at that time that he did not have asbestosis. In the late 1970s and early 1980s, however, Aduddell began experiencing shortness of breath and fatigue, two symptoms of asbestosis.

In April 1983, Aduddell participated in an asbestos screening program conducted in Dallas by the Mt. Sinai Hospital. At his deposition, Aduddell testified under oath that he was told by a doctor from Mt. Sinai on April 24, 1983, that he had asbestosis and was shown x-ray photographs depicting scarring of his lungs. At trial, Aduddell recanted this testimony, stating that in 1983 he was only told that he had scarring of the lungs of the sort that is normally associated with workers in the asbestos trade, **not** that he had asbestosis. He testified that he was not actually

informed that he had asbestosis until he was so informed by Dr. Kurt in September of 1983.

II.

Aduddell filed this suit in the 134th Judicial District Court of Dallas County, Texas, on May 20, 1985. On June 24, 1985, the defendants removed this action to the United States District Court for the Northern District of Texas. Federal jurisdiction was based upon diversity of citizenship. By order of the district court entered in February 13, 1986, this case was set for trial on January 5, 1987. The district court later reset the trial date to February 2, 1987, by an order filed on November 5, 1986.

Pursuant to Local Rule 8.1(c) of the United States District Courts for the Northern District of Texas, parties must file, at least 90 days before trial, a written designation of the expert witnesses they plan to call at trial. It is undisputed that Aduddell did not file such a list. On February 3, 1987, Aduddell filed a motion to allow into evidence the expert testimony of Dr. Thomas Kurt. The defendants opposed this motion, and filed a written response thereto. At trial, the district court denied the motion from the bench, ruling that Dr. Kurt would not be allowed to testify. The district court also noted that, in its opinion, the substance of Dr. Kurt's testimony was not relevant.

The defendants requested that the trial be trifurcated, which the district court granted in part, ordering that separate trial would be held to determine whether Aduddell's claims were barred by statutes of limitations. The parties having waived a jury on this issue, trial was held to the court on February 6, 1987. At the trial, Aduddell essentially testified to the facts as set out in this opinion.

The district court entered findings of fact and conclusions of law from the bench. Specifically, the district court found that

Aduddell knew that he had asbestosis as of April 24, 1983, and that the statute of limitations began to run at that time. In deciding that Aduddell's current version of when he discovered that he had asbestosis was "not believeable," the district court noted that, prior to going to see Dr. Kurt, Aduddell had told his family physician that he had asbestosis and had consulted with an attorney about a potential asbestos lawsuit. Although the district court found that Aduddell actually knew that he had asbestosis in April of 1983, the district court concluded in the alternative that, if Aduddell did not know at that time, he should have known. Applying the two-year statute of limitations contained in section 16.003 of the Texas Civil Practice and Remedies Code, the district court concluded that Aduddell's personal injury suit, filed more than two years after he knew or should have known that he had asbestosis, was time-barred.

The district court also found that all of the asbestos products to which Aduddell was exposed were delivered more than four years prior to May 20, 1985, the date suit was filed. The district court held that the breach of warranty claims made be Aduddell were also time-barred by the four-year statute of limitations contained in section 2.725 of the Texas Business and Commerce Code. Hence, judgment dismissing Aduddell's suit on the merits was entered on February 6, 1987. On February 20, 1987, Aduddell filed his notice of appeal. On appeal, Aduddell makes four arrangements for the reversal of the district court's judgment.

First, Aduddell argues that the district court erred in determining that his personal injury claim accrued on April 24, 1983. Aduddell states that a two-pronged inquiry is necessary to determine when a statute of limitations begins to run. Aduddell argues that the first prong of a limitations analysis involves a determination of when the facts came into existence that authorize the claimant to seek a judicial remedy. Aduddell states that the discovery rule would apply, consists of an inquiry

into when the claimant knew or should have known of the injury. Turning to the first prong of the analysis, Aduddell argues that the district court erred because there was no expert medical testimony in the record or a finding of fact that Aduddell actually had asbestosis on April 24, 1983. Hence, argues Aduddell, the facts authorizing him to seek a judicial remedy were not shown to be in existence at that time. Turning to the discovery prong of the analysis, Aduddell argues that the district court erred in applying a subjective standard, i.e., Aduddell's **belief** that he had asbestosis, as opposed to the objective standard of actual knowledge that he had asbestosis.

Second, Aduddell argues that AWI failed to meet its burden of proof on the affirmative defense of limitations because it failed to offer any medical evidence that Aduddell in fact had asbestosis on April 24, 1983, the date that the district court found that limitations began to run.

Third, Aduddell argues that section 2.725(b) of the Texas Business and Commerce Code runs afoul of the "open courts" provision of article 1, section 14 of the Texas Constitution. Although conceding in his reply brief that this argument was not made to the district court, Aduddell states that the resolution of this issue does not require further factual development in the district court and asks that this court therefore address this issue. Aduddell notes that the district court applied the "delivery rule" in determining that the statute of limitations had run on his breach of warranty claims. This application of article 2.725(b), Aduddell argues, effectively cut off his right to sue before he had a reasonable opportunity to discover the wrong and file suit. Such a result, Aduddell argues, violates the open courts provision of the Texas Constitution as construed by the Texas Supreme Court.

Fourth, Aduddell argues that the district court erred in excluding the expert testimony of Dr. Kurt. According to

Aduddell, Dr. Kurt's testimony would have been that it was impossible to diagnose Aduddell's asbestosis on the basis of the medical examination performed on April 24, 1983, and that it would therefore have been impossible for Aduddell to know that he has asbestosis at that time. Aduddell goes on to argue that Dr. Kurt's testimony should not have been excluded because of Aduddell's failure to designate him as an expert 90 days prior to trial. In support of this proposition, Aduddell argues that the district court's November 6, 1986 order rescheduling the trial to February 6, 1987, was entered 89 days before the rescheduled trial date, making it impossible for Aduddell to comply with the local rule. Aduddell further argues that he filed his list of witnesses on January 26, 1987, pursuant to the district court's pretrial order, in the belief that this order superseded the local rule. Aduddell concedes in his reply brief that, in retrospect, this may not have been the intent of the district court's pretrial order, but maintains that he should not be penalized for an ambiguity in the district court's order. Aduddell also argues that AWI asserted its limitations defense based upon his deposition, which was taken on January 6, 1987, thirty days prior to trial, and that he sought to introduce Dr. Kurt's testimony at the limitations hearing, not at trial on the merits. Aduddell argues that, given these time limitations, it was impossible for him to designate Dr. Kurt as an expert 90 days prior to the hearing. Finally, in his reply brief, Aduddell maintains that local rule 8.1(c) does not apply to **rebuttal** expert witnesses, and that the testimony of Dr. Kurt would have constituted expert rebuttal.

III.

Addressing Aduddell's first argument that the district court erred in concluding that the two-year Texas statute of limitations barred his personal injury claims because the defendants failed to offer any medical testimony, and the district court failed to find, that Aduddell actually had asbestosis in 1983, we find it to be without merit. As regards the

absence of a finding, we think that the district court's finding that Aduddell knew or should have known that he had asbestosis in April of 1983, together with its conclusion that Aduddell's claim was time barred, constituted an implied finding that Aduddell actually had asbestosis at that time. Hence, we reject Aduddell's argument that the district court failed to find that he actually had asbestosis in April of 1983.

Turning to Aduddell's argument that, without medical evidence, the district court could not find that Aduddell actually had asbestosis in 1983, we find it, too, to be without merit. The evidence in support of the district court's finding that Aduddell knew or should have known that he had asbestosis in April of 1983, and its implied finding that Aduddell actually had asbestosis at that time, included Aduddell's admission in his deposition that he was told that he had asbestosis in April of 1983, or, to state the case most favorably to Aduddell, his admission at trial that he was told that he had scarring of the lungs typically associated with working with asbestos, and his admission that he was shown x-rays of the scarring of his lungs. Additional evidence included Aduddell's testimony that he was experiencing fatigue and shortness of breath, two symptoms of asbestosis, prior to April of 1983.

We think that Aduddell's statement that he was told that he had asbestosis in April of 1983, his admission that he was shown x-rays showing a type of scarring of the lungs common to workers in the asbestos industry, a major component of a diagnosis of asbestosis, and his complaints of shortness of breath and fatigue, two major symptoms of asbestosis, are sufficient to sustain the district court's finding that Aduddell either knew or should have known that he had asbestosis in April of 1983, and the corresponding implied finding that Aduddell actually had asbestosis at that time. Because these findings are not clearly erroneous, we affirm the district court's conclusion that Aduddell's personal injury claims are barred by limitations.

We also agree with the defendants that *Fusco* v. *Johns-Manville Prods. Corp.*, 643 F.2d 1181 (5th Cir. Unit A May 1981), controls the disposition of this case. In *Fusco*, the plaintiff, an asbestos worker, appealed the district court's grant of summary judgment in favor of the defendants on their defense of limitations. On appeal, the plaintiff "attempt[ed] to raise a fact issue that he was not aware of a 'medically confirmed' asbestosis condition until 1977." **Id.** at 1183. This court rejected this argument, stating that "a careful review of his original complaint, briefs, affidavits, admissions, and the evidence presented at trial, reflect. . . that he was well aware of his possible condition as early as June of 1970." **Id.** Although the reference in the court's opinion to affidavits and evidence presented at trial might include medical testimony, the opinion states that his asbestosis condition was "possible," and the plaintiff argued that his condition was not "medically confirmed." We think that a fair reading of *Fusco* indicates that there was no medical evidence in that case that the plaintiff actually had asbestosis. Hence, we hold that the defendants did not have to present expert medical testimony showing that Aduddell actually had asbestosis in June of 1983 in order to prevail on their statute of limitations defense, and that the district court's finding on the basis of the evidence adduced at the hearing was not clearly erroneous.

Aduddell's argument that the district court applied a subjective standard in determining when Aduddell knew that he had asbestosis is really a restatement of the above argument. Aduddell is saying that without medical evidence that he actually had asbestosis, the only evidence remaining is his subjective belief that he had the disease, and that this is insufficient to start the statute of limitations running. We reject this argument for the reasons set out above.

Aduddell also argues that his claims sounding in breach of warranty are not time-barred because section 2.725 of the Texas Business and Commerce Code is unconstitutional under the

open courts clause of the Texas Constitution. We decline to consider this argument because Aduddell failed to present it to the district court. As this court has stated:

> The failure to present a theory of recovery or defense to the district court involves waste of judicial and private resources and should be strongly discouraged. In many cases, the failure to pursue a point before the trial court inevitably leads to the conclusion that the issue will not receive judicial consideration.

Federal Deposit Ins. Corp. v. *Castle*, 781 F.2d 1101, 1104 (5th Cir. 1986) (issue raised for the first time in Rule 60(b) motion).

We also reject Aduddell's argument that the district court committed reversible error in refusing to allow Dr. Kurt to testify because of Aduddell's failure to designate Dr. Kurt as an expert witness 90 days prior to trial as required by local rule. Local Rule 8.1(c) for the United States District Court for the Northern District of Texas provides:

> **Designation of Expert Witnesses:** Each party shall designate in writing with the Clerk of the Court its expert witnesses at least 90 days before the trial unless the Court directs otherwise. This designation shall not apply to rebuttal witnesses.

It is undisputed that Aduddell failed to comply with this rule. A district court's exclusion of expert testimony for the failure to timely comply with the requirements of a local rule that the expert to be designated prior to trial is reviewed by this court under the abuse of discretion standard. *Sturgeon* v. *Airborne Freight Corp.*, 778 F.2d 1154, 1157 (5th Cir. 1985) (citing *Dixon* v. *International Harvester Co.*, 754 F.2d 573, 584 (5th Cir. 1985)). In *Sturgeon*, we found no abuse of discretion in the district court's failure to comply with Local Rule 8.1(c) when, from the beginning of the lawsuit, plaintiff's counsel was aware of the need for the expert testimony. **See id.** at 1158. Similarly, in the case

sub judice, Aduddell's counsel was aware that he would rely on Dr. Kurt as an expert in proving his case. Aduddell's argument that AWI asserted its limitations defense based upon his deposition, which was taken on January 6, 1987, and that therefore he had no time to designate Dr. Kurt as an expert witness is also unpersuasive. Aduddell's counsel was aware, at least from date that the defendants filed their answer, that defendants would be relying on the statute of limitations as a defense, and that Dr. Kurt would therefore be needed as a witness to support the theory that Aduddell could not possibly have been diagnosed as having asbestosis more than two years prior to the date the complaint was filed. Hence, this does not present a case in which the need for expert testimony is discovered close to the time of trial.

Aduddell's argument that he could not have complied with the 90-day deadline because the district court's order resetting the case was entered 89 days prior to the new trial date is also without merit. This argument misses the point that, on November 5, 1986, the date of the district court's order resetting the case to February 6, 1987, Aduddell had already missed the 90-day deadline for designating his experts for the original trial date of January 6, 1987. Had Aduddell designated his experts within 90 days of the original trial setting, he would **prima facie** have also made a timely designation for the new setting a month later. Aduddell cannot argue that each order resetting a case begins the 90-day period for designating experts anew. Aduddell, by failing to designate his experts in a timely fashion for the first trial setting, assumed the risk that the trial date would either not be reset or would be reset, but at a date less than 90 days in the future from the order resetting the case. Aduddell cannot complain that the new trial setting did not give him additional time to designate his experts.

Aduddell also argues that Dr. Kurt was an expert **rebuttal** witness, and therefore did not need to be designated under Local Rule 8.1(c). We find no indication in the record that this argu-

ment was presented to the district court, and we therefore decline to consider it for the first time on appeal.

We also reject Aduddell's other arguments for excusing compliance with Local Rule 8.1(c). Aduddell's argument that he believed that the district court's pre-trial superseded the local rule is without merit. We have reviewed the district court's November 5, 1986, order and find nothing in the language of the order which could reasonably be construed as superseding Local Rule 8.1(c). In fact, the order makes no mention at all of expert witnesses. Aduddell's argument that the defendants' designation on their expert witness list of all physicians that had examined Aduddell excused Aduddell's compliance with Local Rule 8.1(c) assumes too much. It is likely, although not certain, that had the defendants sought to call Dr. Kurt as a witness, this general designation might have allowed them to do so. However, the defendants' right to call Dr. Kurt is not in dispute, and their compliance with the local rules of the district court does not excuse Aduddell's failure to comply. Finally, Aduddell's argument that he sought to introduce Dr. Kurt's testimony at the limitations hearing, not at trial on the merits, is also unpersuasive. The district court granted in part the defendants' motion for trifurcation of the trial and ordered that the first part of the trial be a hearing on whether Aduddell's claims were barred by limitations. Aduddell's statement that this is a "hearing," not a "trial on the merits," is simply incorrect; the limitations hearing was one component of the trial of the case. In summary, the district did not abuse its discretion in excluding the testimony of Dr. Kurt.

IV.

For the above reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1136

EDWIN A. ADUDDELL,

Plaintiff-Appellant,

versus

GAF CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(September 22, 1987)

Before RANDALL, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

NO. 87-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN I. ADUDDELL,

Petitioner

VS.

GAF CORPORATION, ET AL,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Attorneys for Respondents

LISTING UNDER SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each Respondent:

1. GAF Corporation has no parent, subsidiary or affiliate companies.

2. Armstrong World Industries, Inc. has no parent or subsidiary companies. It has two affiliated companies, ArmStar Venture Assoc. and Forms + Surfaces.

3. Owens-Corning Fiberglas Corporation has no parent or affiliated companies. It has two subsidiaries, Oregon Metallurgical Corporation and O.C. Birdaire.

4. The Celotex Corporation is a subsidiary of Jim Walter Corporation. It has no subsidiary or affiliated companies.

5. Eagle-Picher Industries, Inc. has no parent or affiliated companies. It has one subsidiary, Diehl & Eagle-Picher, Gmbh.

6. Fibreboard Corporation is a subsidiary of Louisiana Pacific Corp. It has no subsidiary or affiliated companies.

7. Keene Corporation is a subsidiary of Bairnco, Inc. It has no subsidiary or affiliated companies.

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NO. 87-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN I. ADUDDELL,

Petitioner

VS.

GAF CORPORATION, ET AL.,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, GAF Corporation, Armstrong World Industries, Inc., Owens-Corning Fiberglas Corporation, The Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation and Keene Corporation file their Response to Aduddell's Petition for Writ of Certiorari.

ARGUMENT

Petitioner (hereinafter "Aduddell") filed his lawsuit in a state district court in Dallas, Texas, alleging that he suffered from asbestosis as a result of exposure to asbestos containing products manufactured by Respondents. Respondents removed the suit to federal court and asserted limitations as a defense. The district court, after bifurcation, held a bench trial on Respondents' affirmative defense of limitations. The judge found Aduddell's claims were

barred, ruling that Aduddell filed his lawsuit more than two years after he discovered, or should have discovered, that he suffered from asbestosis. Aduddell now asserts in this Court that Rule 11 of the Federal Rules of Civil Procedure prevented him from timely filing suit and should be used to toll the running of the limitations period. Aduddell's arguments are without merit for three reasons:

1. Rule 11 of the Federal Rules of Civil Procedure did not apply to Aduddell's filing of his original complaint in Texas state court;

2. Aduddell failed to raise this issue in the district court; and

3. Rule 11 does not control the issue before this Court.

For each of the above reasons, this Court should deny Aduddell's Petition for Writ of Certiorari.

A. **Rule 11 of the Federal Rules of Civil Procedure did not apply to Aduddell's filing of his original complaint in Texas state court.**

Aduddell filed his suit in the 134th Judicial District Court of Dallas County, Texas, on May 20, 1985. (A–10 of Petition). On June 24, 1985, Respondents removed this action to the United States District Court for the Northern District of Texas and federal jurisdiction was based on diversity of citizenship. (A–10 of Petition). Rule 11 of the Federal Rules of Civil Procedure obviously did not apply to Aduddell's filing of his complaint in state court and Aduddell has no claim that the Rule affected his ability to timely file his cause of action. Additionally, this Court should note that at the time Aduddell filed his complaint in Texas state court, Texas had no Rule 11 equivalent. (*See* Chapter 9 of the Texas Civil Practice & Remedies Code, effective September 2, 1987 and Rule 13 of the Texas Rules of Civil Procedure, effective January 1, 1988). Because Rule 11 of the Federal Rules of Civil Procedure did not apply to the filing of Aduddell's cause of action, Respondents would show that Aduddell's Petition should be denied.

B. **Aduddell failed to raise this issue in the district court.**

Aduddell asserts that he presented his argument to the Fifth Circuit and that Court avoided addressing the Rule 11 issue. In truth, however, Aduddell referred to Rule 11 in only one sentence of the twenty-three pages of briefing he presented to the Fifth Circuit. Aduddell further failed to raise any concerns about Rule 11 before the district court. Respondents would therefore show that Aduddell has waived any alleged error.

Respondents would further show that because Aduddell failed to raise this issue before the district court, there is nothing in the Record in this appeal to show how Rule 11 affected his ability to timely file suit. There is no evidence that Aduddell's counsel had Rule 11 concerns. There is further no evidence of a date, if any, that Aduddell's counsel determined after reasonable inquiry that his client's claim was "well grounded in fact." The Record is void of any evidence which would assist the Court in making a ruling on the relationship of Rule 11 to Aduddell's ability to timely file suit.

C. **Rule 11 does not control the issue before this Court.**

Before a Federal Rule of Civil Procedure is found to prevail over a state law concerning limitations, this Court must determine that the scope of the federal rule is sufficiently broad to control the issue before the Court. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965). The Court must determine that the rule, properly construed, truly comprehends the disputed issue and is in direct conflict with state law. 19 Wright & Miller, Federal Practice and Procedure, § 4510 at 164 (1982 ed.). On the other hand, if there is no indication that a federal rule was intended to toll a state statute of limitations, there is no need to apply the *Hanna v. Plumer* analysis and the state statute of limitations controls. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1979 (1980). *See also, Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233 (1949).

A clear reading of Rule 11 indicates that there was no intention that it toll a state statute of limitations. While Rule 11 requires inquiry into both the facts and law before a pleading is filed, the level of inquiry is tested against a standard of reasonableness under the circumstances. What constitutes a reasonable inquiry may depend upon several factors, including how much time for investigation was made available to the signer. The Advisory Committee noted:

> "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on *such factors as how much time for investigation was avilable to the signer*; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." (emphasis added)

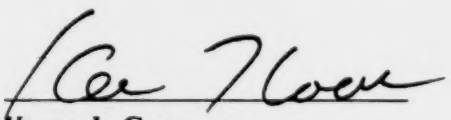
Rule 11 thus contemplates situations in which an attorney, due to an impending deadline established by limitations, has a short period of time in which to file a complaint. The Advisory Committee Notes demonstrate that Rule 11 was not intended to grant an attorney additional time to be added to the period of limitations in which to make an investigation, rather, the amount of time an attorney has in which to make his investigation is but one of the factors to be considered in determining whether an attorney's actions comply with Rule 11. Therefore, Rule 11 and the statute of limitations can exist "side by side . . . each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel Corp., supra,* 446 U.S. at 752, 100 S.Ct. at 1986. As a result, Aduddell's assertion that Rule 11 conflicted with his ability to timely file suit is without merit and should be rejected by this Court.

CONCLUSION

This Court should deny Aduddell's Application for Writ of Certiorari. Aduddell is contending before this Court that Rule 11 of the Federal Rules of Civil Procedure conflicts with the statute of limitations applicable to his claim and prevented him from timely filing his cause of action. In reality, however, Rule 11 did not apply to Aduddell's filing of his lawsuit in state court. Aduddell failed to raise this argument before the district court and presented no evidence of how Rule 11 affected his ability to timely file suit. Finally, under the analysis well established by this Court, Rule 11 simply does not conflict with the Texas statute of limitations and there is no showing it was intended to toll a limitations period.

Respectfully submitted,

DeHay & Blanchard



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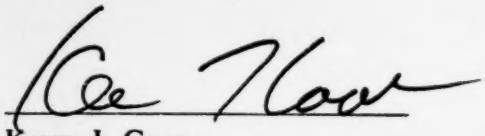
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to Mr. Mark Seigel, 3607 Fairmount St., Dallas, Texas 75219, this 20 day of January, 1988.



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